IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE $119, 805 IN U.S. CURRENCY

No. 2 CA-CV 2017-0136
Filed July 11, 2018

Appeal from the Superior Court in Pima County
No. C20120703
The Honorable Sarah R. Simmons, Judge

AFFIRMED

COUNSEL

Kimminau Law Firm P.C., Tucson
By Chris J. Kimminau
Counsel for Appellant

Barbara LaWall, Pima County Attorney
By Ellen R. Brown, Deputy County Attorney, Tucson
Counsel for Appellee

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 In this civil *in rem* forfeiture action, William Wright appeals from the trial court's imposition of sanctions and its rulings on competing motions for summary judgment. We affirm.

Issues

¶2 Wright contends that the trial court erred by requiring him to physically appear for a deposition, by awarding attorney fees to the state for his missed depositions, by imposing discovery sanctions barring him from presenting any evidence at trial, by granting summary judgment for the state, and by failing to grant him partial summary judgment on the issue of ownership. The state contends that the court did not so err. The issues to be decided are: 1) Did the court abuse its discretion in imposing discovery sanctions on Wright, including sanctions that barred him from introducing evidence at trial? And, 2) Did the court err in granting the state's motion for summary judgment and in denying Wright's motion for partial summary judgment?

Factual and Procedural Background

¶3 On November 11, 2011, Pima County Sheriff Department Deputies stopped William Wright for a civil traffic infraction and seized $119,805 in U.S. currency for forfeiture. All parties who may have an interest in the property, including Wright, were served notice of the forfeiture proceeding. In February 2012, Wright filed a judicial claim for the property, and, in March 2012, the state filed an *in rem* forfeiture complaint. In October 2012, the trial court stayed the proceedings until the termination of Wright's related criminal matter. Wright's criminal charges were thereafter dismissed, and the court lifted the stay.

¶4 In February 2016, the state served Wright with a request for production of documents as to, among other things, Wright's alleged ownership of the cash, its source, and the circumstances of his travel to

Arizona. On May 13, 2016, the state filed a motion to compel Wright's production of documents. On June 13, 2016, at the hearing on the motion, Wright argued that the requested documents (bank and phone records) were not in his custody or control and offered to sign releases permitting their production. The trial court ordered Wright to either produce the documents within ten days or file "something" under oath certifying that he had tried to but could not obtain the records, or else the court would impose "further sanctions." On June 24, 2016, Wright produced some requested documents, but did not, as ordered, certify under oath his efforts to produce others.

¶5 On June 28, 2016, the state filed a motion for sanctions to strike Wright's claim for his failure to follow the trial court's order. After the state had filed its motion, but before the motion was heard, Wright failed to appear for his deposition on June 29. At the August 2016 hearing on the motion for sanctions, the state argued that Wright's claim should be struck both because of his failure to comply with the court's discovery order and because of his failure to appear at his deposition. Wright argued that he complied with the discovery orders in good faith and that his being in Florida lead to the untimeliness. Wright also argued that the cost of travel from Florida to Arizona to attend the deposition was prohibitive, and that he would be "asking for the Court to allow for a telephonic deposition." The court ordered that Wright appear in person for his deposition, and warned him that he would be sanctioned if he did not appear. The court also stated that it would impose sanctions if Wright's production of discovery was not "verif[ied] . . . within one week."[1] The state requested costs and attorney fees related to the missed deposition, and the court granted them.

¶6 On September 23, 2016, the state filed another motion for sanctions to strike Wright's claim after he had, again, missed his deposition, which had been scheduled for September 20. At the September 30 hearing, the state asked for sanctions for the earlier discovery violations as well as for the most recently missed deposition. The state argued that, because Wright had not produced relevant bank records, he should be sanctioned and barred from producing any further documents in support of his claim. Wright's counsel argued that he had told his client the wrong date of the deposition, and therefore, Wright's failure to appear was not willful. Wright also argued that sanctions were inappropriate because the parties

[1]Wright produced his verified response to the state's request for production of documents on August 19, 2016.

had not engaged in a good-faith consultation required by Rule 26(g), Ariz. R. Civ. P. The trial court denied the state's motion to strike Wright's claim, but it precluded Wright from offering as exhibits any records not yet produced. The state also requested attorney fees, which the court granted, assessing $2,620 against Wright's counsel.

¶7 On September 30, 2016, the state filed a notice of deposition of Wright for November 4, 2016. Wright did not file an objection to the place of deposition. On September 27, 2016, Wright was incarcerated in Florida. On November 1, 2016, the state filed a motion opposing any postponement of Wright's November 4 deposition, claiming that, although Wright's counsel knew that Wright was incarcerated since October 20, his counsel had not sought any relief from the trial court, and therefore the deposition should not be postponed. On November 4, Wright did not attend his deposition but instead filed a motion to extend the deadline for the deposition, noting that he was currently in custody without bond on federal charges, with trial set for December 2016. On November 10, the state filed a third motion for sanctions to strike Wright's claim. Wright filed a response in which he offered to attend his deposition either by phone or in person at the facility where he was held, but he did not otherwise seek a protective order.

¶8 At the December 2016 evidentiary hearing on the sanctions motion, the state opposed Wright's request for a telephonic deposition, arguing that Wright should not be given another opportunity for a deposition. The trial court initially ordered, as a sanction, that Wright could not offer any testimony on his own behalf, but the court later rescinded that sanction. The court continued the evidentiary hearing until January 2017.

¶9 At the January 2017 evidentiary hearing, the state argued that the trial court should strike Wright's claim because of his repeated discovery violations. Wright, appearing telephonically, testified that he missed the first deposition due to his sick mother, the second deposition due to his counsel telling him the wrong date, and the third deposition due to his being incarcerated. Wright additionally testified that he was willing to be deposed telephonically. The court refused to grant the ultimate sanction of striking Wright's claim, and instead barred him from "present[ing] any evidence . . . on this matter." The court based its ruling on the cumulative discovery violations, finding that Wright willfully did not respond to the interrogatories, that Wright willfully failed to attend two of the depositions, and that it was Wright's obligation to move for a telephonic deposition. The court found that Wright's counsel was also at fault.

¶10 In March 2017, the state filed a motion for summary judgment, which it supported with depositions from Detectives Svec and Barajas and an affidavit from Detective Boudreau, among other exhibits. According to his deposition, in November 2011, Barajas met with Wright and another man, J.C. Barajas negotiated the purchase of marijuana with J.C., while Wright sat in the truck. Barajas met with Wright and J.C. a second time to complete the transaction. Barajas asked Wright if he was ready to complete the deal, and Wright said he was. However when Barajas asked to the see the money, Wright refused and, because the operation was not going as planned, Barajas, looking out for his own safety, terminated the transaction. Sheriff Deputies later stopped Wright in his car for a traffic violation, discovered the cash, and seized it.

¶11 Wright filed an opposition to the state's motion and filed his own motion for partial summary judgment on the issue of ownership. The state opposed Wright's motion, arguing, in part, that the trial court's sanctions prevented Wright from meeting his burden of proving ownership.

¶12 In May 2015, at the hearing on the competing motions for summary judgment, the trial court initially noted that it was inclined to deny each. The state then emphasized that, because of the court's earlier sanction precluding Wright from presenting evidence, Wright could not meet his burden to show ownership of the property, nor could he present evidence to rebut the state's factual showing that the property was subject to forfeiture. Wright argued that, because he claims he owns the property, the state admits he controlled the property, and the state put forward no evidence to show that anyone else owns the property, there are no issues of material fact on the issue of ownership.

¶13 The trial court denied Wright's motion for partial summary judgment and granted the state's motion for summary judgment. The court determined that the sanctions imposed on Wright prevented him from proving ownership and from rebutting the state's evidence showing that there was no genuine issue of material fact. Wright's appeal followed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

Principles of Law

Forfeiture Action

¶14 The state may file an *in rem* action for forfeiture of all proceeds or property traceable to, among other things, an act committed for financial gain that involves "prohibited drugs, marijuana or other prohibited

chemicals or substances." A.R.S. § 13-2301(D)(4)(b)(xi), 13-2314(G)(3). In a forfeiture proceeding, anyone who has filed a claim to such proceeds or property bears the initial burden to prove ownership of the property by a preponderance of the evidence "before other evidence is taken." A.R.S. §§ 13-4311(D), 13-4310(D); *State ex rel. Horne v. Anthony*, 232 Ariz. 165, ¶ 42 (2013). If the claimant has carried that burden, the state then has the burden of establishing that the property is subject to forfeiture by clear and convincing evidence. A.R.S. § 13-4311(M). If the state does so, the claimant then can show that the property is exempt from forfeiture by a preponderance of the evidence. *Id.*

Place and Manner of Deposition

¶15 In discovery, a party may depose any other party on serving a written notice stating "the date, time, and place of the deposition." Ariz. R. Civ. P. 30(a), (b)(1).[2] "The parties may stipulate or the court may order that a deposition be taken by telephone." Ariz. R. Civ. P. 30(b)(7). If a party wishes to avoid a deposition as noticed, he must seek a protective order and the court may enter orders specifying a time and place for the discovery to protect him from the "undue burden or expense." Ariz. R. Civ. P. 26(c)(1); *see also Lewis R. Pyle Mem'l Hosp. v. Super. Ct.*, 149 Ariz. 193, 198 (1986) (to avoid deposition, deponent must seek protective order under Rule 26(c) in advance).

Sanctions

¶16 A court may impose sanctions on a party who fails to respond to discovery or attend a noticed deposition. Ariz. R. Civ. P. 37(f). Rule 37(f) provides that "[s]anctions may include any of the orders listed in Rule 37(b)(2)(A)(i) through (vi) . . . [i]nstead of or in addition to" fees, and Rule 37(b)(2)(A)(ii) permits the court to "prohibit[] the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." In general, "trial courts are vested with wide discretion concerning discovery" sanctions, *Granger v. Wisner*, 134 Ariz. 377, 381 (1982), and "if there [is] any reasonable basis for the exercise of such discretion, [the trial court's] judgment will not be disturbed," *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570-571 (1985), *quoting Jones v. Queen Ins. Co.*, 76 Ariz. 212, 214 (1953).

[2]We cite to the Arizona Rules of Civil Procedure in effect at the time of this case. *See* Ariz. Sup. Ct. Order R-16-0010 (Sept. 2, 2016).

Summary Judgment

¶17 "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *accord Orme School v. Reeves*, 166 Ariz. 301, 305 (1990). The opposing party cannot rest on his pleadings, but "must . . . set forth specific facts showing a genuine issue for trial." Ariz. R. Civ. P. 56(e). "An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Ariz. R. Civ. P. 56(c)(5).

Analysis

Sanctions

Place and Manner of Deposition

¶18 Preliminarily, Wright argues that the trial court abused its discretion by refusing to allow him to be deposed by telephone and by ordering him to physically appear at the noticed deposition in Arizona. We note that Wright filed no motions requesting to appear by telephone prior to any of his noticed depositions. At the August 2016 evidentiary hearing, Wright's counsel argued:

> The issue about – I mean, he says that it was $1,000 for him to get here, so I would probably be asking for the Court to allow for a telephonic deposition or a video deposition in the event that – you know, I mean, certainly he has to submit to a deposition. There is no doubt about that. But, I mean, he can't afford to get here, is what he is telling me. That is all – honestly what he is telling me. But there is no Motion to Compel the deposition that is properly before you.

The court ruled as if Wright had made a request to appear telephonically, denying it. The rules allow for but do not require a court to grant a request to appear telephonically at a deposition. *See* Ariz. R. Civ. P. 30(b)(7). Wright provides no binding authority showing that the court abused its discretion by denying his request. As such, we find no abuse of the court's broad discretion.

¶19 Moreover, Wright did not seek a protective order under Rule 26(c) for any undue burden because of the place of deposition. *Cf. Lewis R. Pyle Mem'l Hosp.*, 149 Ariz. at 198 (deponent may not refuse to be deposed and must seek relief under Rule 26(c)). Therefore, we will not address his complaint under Rule 37.[3] *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (errors not raised in trial court cannot be raised on appeal).

Discovery Violations

¶20 Wright argues that the trial court erred by prohibiting him from presenting any evidence at trial as a sanction for his multiple discovery violations. "The policy behind the disclosure rules is not to create a 'weapon' for dismissing cases on a technicality." *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 13 (App. 2003), *quoting Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287 (1995). "[T]he purpose of sanctions. . . is to coerce . . . cooperation rather than to dispose of litigation as a form of punishment." *Estate of Lewis v. Lewis*, 229 Ariz. 316, ¶ 17 (App. 2012), *quoting Jancauskas v. Tow Motor Corp.*, 261 N.E.2d 753, 755 (Ill. App. 1970). "Drastic sanctions running counter to that policy therefore are disfavored and must be based on a determination of willfulness or bad faith by the party being sanctioned." *Lewis*, 229 Ariz. 316, ¶ 18. Sanctions for abuses of discovery "must be appropriate, and they must be preceded by due process." *Montgomery Ward & Co. Inc. v. Super. Ct.*, 176 Ariz. 619, 622 (App. 1993).

¶21 Wright initially argues that, although barring the presentation of evidence is a lesser sanction than dismissal, it amounted to a "metaphorical death penalty." Although, in general, the trial court has broad discretion to impose sanctions under the discovery rules, *Granger*, 134 Ariz. at 381, "when a court imposes severe sanctions such as dismissal, striking a pleading, or entering a default judgment, 'its discretion is more limited than when it employs lesser sanctions,'" *Lewis*, 229 Ariz. 316, ¶ 18, *quoting Roberts v. City of Phoenix*, 225 Ariz. 112, ¶ 27 (App. 2010). If the practical effect of a lesser sanction is to "terminate the litigation," we review

[3]Wright also argues that the trial court erred in ordering him to physically appear for his deposition because neither the Rules of Civil Procedure or the forfeiture statute explicitly state where a deposition of a party is to take place, and because he was entitled to be treated as a witness under Rule 45(b)(3)(B), Ariz. R. Civ. P. Because Wright did not raise these arguments below, we do not address them here. *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994).

the trial court's discretion as if it had ordered the ultimate sanction of dismissal. *Zimmerman*, 204 Ariz. 231, ¶ 19.

¶22 Here, because Wright bore the initial burden in the forfeiture case of establishing ownership, the trial court's sanction prevented him from meeting this initial burden. A.R.S. § 13-4310(D); *cf. Zimmerman*, 204 Ariz. 231, ¶ 19 ("If a plaintiff cannot introduce evidence of any kind because of nondisclosure the obvious outcome is the dismissal of the case."). The court conceded as much in its summary judgment ruling. Thus, we review the court's imposition of this most severe sanction in light of its more limited discretion.

¶23 Wright argues that the sanction is "not justified under the facts." Wright argues that the discovery violations were not committed in bad faith or otherwise a result of gross negligence. However, the trial court found that the discovery violations were "willful," not that they were made in bad faith. The court stated:

> This is a cumulative hearing as to all of his failures to abide by this Court's orders, and the Court finds that he willfully failed to abide by the court's order with respect to answering interrogatories [and] by failing to keep in communication. He willfully failed to appear for his first deposition. He willfully failed to appear for his [third] deposition because it was within his control as to whether he committed additional crimes or was out on a warrant and arrested.

The record of Wright's multiple failures to attend noticed depositions, untimely and incomplete discovery responses, and non-compliance with the court's discovery orders supports these findings.

¶24 Wright next argues, for the first time on appeal, that the imposed sanction is an abuse of discretion because A.R.S. § 13-4311(L) mandates that Wright be allowed to present evidence. We will not address arguments not raised below. *Trantor*, 179 Ariz. at 300. Wright additionally argues that the presentation of evidence in an *in rem* forfeiture proceeding is a substantive right. Even if true, Wright provides no authority for the proposition that such a substantive right cannot be forfeited. *Cf. Del Castillo v. Wells*, 22 Ariz. App. 41, 43 (1974) (substantive right of peremptory change of judge can be waived by not timely filling an affidavit).

¶25 Wright next argues that sanctions prohibiting the presentation of evidence in an *in rem* forfeiture proceeding violate constitutional due process.[4] Forfeiture proceedings comply with due process by providing parties notice and the opportunity to be heard. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993); *In re $2,390 U.S. Currency*, 229 Ariz. 514, ¶ 12 (App. 2012). Here, Wright was given notice and the opportunity to be heard, but forfeited that opportunity by his willful discovery violations. Moreover, the trial court complied with the due process required when imposing sanctions by holding an evidentiary hearing and making the necessary findings that the violations were willful and that the violations were Wright's fault and not his counsel's. *See Lewis*, 229 Ariz. 316, ¶20; *see also Zimmerman*, 204 Ariz. 231, ¶ 23 (hearing required to determine fault for discovery violation); *Wayne Cook Enters., Inc. v. Fain Props. Ltd.*, 196 Ariz. 146, ¶ 12 (App. 1999) ("Ordinarily, [the imposition of dismissal as a sanction] requires an evidentiary hearing.").

¶26 Wright also argues the sanctions are disproportionate to the discovery violations. "[W]hether sanctions are appropriate is a fact-intensive inquiry and may involve consideration of many factors." *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 47 (App. 2009). In *Allstate*, our supreme court set out a number of non-exclusive factors to determine whether a party had good cause for a discovery violation under then Rule 26.1(c).[5] 182 Ariz. at 287. Our court later compiled these factors in *Marquez v. Ortega*:

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[4]To the extent that Wright relies on *Hovey v. Elliott*, 167 U.S. 409, (1897) and *Hammond Packing Co. v. State of Ark.*, 212 U.S. 322 (1909), for the proposition that litigation-terminating sanctions always run afoul of due process in *in rem* forfeiture proceedings, we disagree. In *Green v. Lisa Frank, Inc.*, we determined that "if the sanctioned conduct invites a negative inference about the merits of the party's claims or defenses, the due process requirement of *Hovey* and *Hammond* is met, and merits-terminating sanctions are constitutionally appropriate." 221 Ariz. 138, ¶ 35 (App. 2009). Here, Wright's failure to produce documents or timely verify his answers to interrogatories, and his multiple failures to attend depositions, invite an inference that his position on the merits is weak. *Cf. Green*, 221 Ariz. 138, ¶ 36.

[5]Our supreme court deleted Rule 26.1(c) and replaced it with Rule 37(c)(1), intending to incorporate the holding of *Allstate*. *See Marquez v. Ortega*, 231 Ariz. 437, ¶ 21 (App. 2013).

> (1) the reason for the failure to properly disclose evidence; (2) the willfulness or inadvertence of a party's (or attorney's) conduct; (3) prejudice to either side that may result from excluding or allowing the evidence; (4) the opposing party's (or attorney's) action or inaction in attempting to resolve the dispute short of exclusion; and (5) the overall diligence with which a case has been prosecuted.

231 Ariz. 437, ¶ 23 (App. 2013), *citing Allstate*, 182 Ariz. at 288. In *Green*, we set out similar factors when reviewing a court's dismissal of a case under its contempt powers:

> (1) prejudice to the other party, both in terms of its ability to litigate its claims and other harms caused by the disobedient party's actions; (2) whether the violations were committed by the party or by counsel; (3) whether the conduct was willful or in bad faith and whether the violations were repeated or continuous; (4) the public interest in the integrity of the judicial system and compliance with court orders; (5) prejudice to the judicial system, including delays and the burden placed on the trial court; (6) efficacy of lesser sanctions; (7) whether the party was warned that violations would be sanctioned; and (8) public policy favoring the resolution of claims on their merits.

221 Ariz. 138, ¶ 45. Although neither *Allstate* nor *Green* reviewed sanctions under Rule 37(f), the above-enumerated factors provide guidance in evaluating whether sanctions are appropriate here.

¶27 In *Gulf Homes, Inc. v. Beron*, our supreme court affirmed an order of dismissal as a sanction for not complying with a court order by conduct amounting to a failure to appear at a noticed deposition. 141 Ariz. 624, 628-29 (1984) (deponent showed "knowing and callous disregard" of court order to appear). In applying the non-exclusive factors enumerated in *Allstate* and in *Green*, as in *Gulf Homes*, we find that the sanctions were neither inappropriate nor disproportionate. Here, the trial court found that Wright had willfully committed multiple discovery violations including by actually failing to appear at his depositions. Although the court made no

explicit findings of prejudice, such findings are implicit, given that the court twice awarded reasonable fees to the state, the original trial date was postponed due to the need for discovery, Wright did not produce documents until six months after the state originally requested them, and the state noticed and prepared for three depositions that Wright failed to attend. Moreover, the court, itself, was prejudiced through multiple delays and the need to conduct several hearings on the issues arising out of Wright's discovery violations. *See Marquez*, 231 Ariz. 437, ¶ 22 (delay, even when no trial date is set, may constitute prejudice enough to sustain a trial court's sanction of precluding evidence).

¶28 In addition to the numerous discovery violations and delays, Wright and his counsel failed to communicate, timely or at all, on key issues, Wright gave the state very little notice when he failed to attend his depositions, and Wright rarely sought relief from the trial court before discovery deadlines passed. Although public policy favors deciding claims on their merits, public policy also favors compliance with court orders and the discovery rules. *See Green*, 221 Ariz. 138, ¶¶43-45. Indeed, "[t]he question, of course, is not whether [the reviewing court] would as an original matter have dismissed the action; it is whether the [trial court] abused its discretion in so doing." *Gulf Homes*, 141 Ariz. at 628, *quoting Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). We find no such abuse of discretion here.

¶29 Finally, Wright argues that for each discovery violation "there were extenuating circumstances" that should preclude litigation-terminating sanctions. In *Copper State Bank v. Saggio*, a party failed to appear at a noticed deposition because it was election day and he was very involved in political activities. 139 Ariz. 438, 441 (App. 1983). We found that those reasons did not excuse his failure to attend and upheld the trial court's sanction of dismissal. *Id.* However, in *Foster v. Brooks*, we reversed the court's sanction of dismissal, where the party's excuse for failure to attend a noticed deposition involved a death in the family. 7 Ariz. App. 320, 323-24 (1968). Wright's excuses for not attending his depositions—caring for his ailing mother in Florida, the prohibitive cost of travel to Arizona, and his own incarceration—are more akin to that in *Copper State* than that in *Foster*. Although caring for his ailing mother may have provided good cause to postpone a deposition, it does not excuse the failure to attend a deposition with practically no advance notice. This is clearly distinguishable from *Foster*, where an unanticipated death in the family necessitated the transportation of a child over long distances. *Id.* We infer that the trial court found Wright's excuses insufficient. *See Wippman v. Rowe*, 24 Ariz. App. 522, 525 (1975) ("We may infer from any judgment the

findings necessary to sustain it if such additional findings do not conflict with express findings and are reasonably supported by the evidence."). We find no abuse of discretion.

Attorney Fees as a Discovery Sanction

¶30 Rule 37(f) states that a party failing to attend a deposition may be ordered "to pay the reasonable expenses, including attorney's fees, caused by the failure." Wright argues the trial court erred in imposing attorney fees under Rule 37(f) because his failure to attend the depositions did not "cause" the state to prepare for them. The state put forward competent evidence to the contrary. The court seemingly accepted the state's evidence. Such preparation would therefore properly be compensable under Rule 37(f). Even so, minimally, his conduct wasted time and "[w]asting everyone's time is sanctionable." *In re Radacosky*, 183 Ariz. 531, 535 (App. 1995).

¶31 Wright next argues, as he did below, that the trial court erred by calculating the attorney fees at the prevailing hourly rate for a private attorney in the community instead of the actual hourly rate of the attorneys in question. Where the statute does not explicitly limit such fees to the amount paid, the reasonable attorney fee for a public, salaried attorney is the "prevailing reasonable hourly rate for similar services in the community." *State v. Mecham*, 173 Ariz. 474, 485 (App. 1992); *see also State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 591-92 (App. 1992) (State attorney's reasonable fees are determined at "prevailing market rate."). Wright points to no authority that limits attorney fees to the amount paid in salaries. Thus, we find that the court did not err in assessing fees at the prevailing hourly rate.

¶32 Wright next argues that the trial court abused its discretion by assessing attorney fees against his counsel because his counsel merely made "a mistake" in informing Wright of the wrong deposition date and did not "advise" him to miss the deposition. Rule 37(f) explicitly states that "the attorney advising" the party may be assessed attorney's fees. At best, Wright's counsel advised Wright to attend his deposition on the wrong date despite having notice of the correct date. Wright's counsel concedes, as he must, that it was his advice that directly caused Wright to fail to attend the deposition. This was sufficient to constitute sanctionable conduct, and, at a minimum, wasted everyone's time. *In re Radacosky*, 183 Ariz. at 535. The court did not abuse its discretion in assessing fees as a sanction.

Summary Judgment Motions

¶33 Wright argues that the trial court erred by granting summary judgment for the state. We review a trial court's grant of summary judgment on the basis of the record made in the trial court, but determine *de novo* whether the entry of summary judgment was proper. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 9 (App. 2009).

¶34 A moving party meets its initial burden by coming forward with evidence showing that there are no genuine issues of material fact preventing entry of judgment as a matter of law. Ariz. R. Civ. P. 56(a). Then the burden shifts to the non-moving party, who must "call the court's attention to evidence overlooked or ignored by the moving party or must explain why the motion should otherwise be denied." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 26 (App. 2008). Summary judgment is proper, even if the opposing party has raised a "scintilla of evidence" or a slight doubt, when the evidence before the court was such that, if produced at trial, the trial judge would have been required to enter judgment for the moving party. *Orme School*, 166 Ariz. at 311.

¶35 Wright first argues that the sanction only prevented him from presenting evidence at trial, and not at a pretrial summary judgment proceeding. Even at the summary judgment stage, however, the trial court can only consider evidence admissible at trial. *See Comerica Bank v. Mahmoodi*, 224 Ariz. 289, ¶ 20 (App. 2010). The trial court did not err in refusing to consider Wright's evidence because such evidence was inadmissible at trial due to the sanctions.

¶36 Wright further argues that summary judgment was improper because the state relied on inadmissible evidence and the trial court relied on hearsay statements from his alleged coconspirators. However, Wright does not identify which statements are objectionable or how he believes the court relied on those statements. In its summary judgment ruling, the court did not mention any statements from the alleged coconspirators. Thus, we find no support for this argument.

¶37 Wright also argues that the entry of summary judgment was erroneous because he was not given the opportunity to challenge the credibility of state witnesses, Detectives Svec and Barajas, in front of the trial court. Wright deposed both Svec and Barajas. Nothing in the court's sanction order prevented Wright, in his response to the state's motion for summary judgment, from identifying deposition testimony that created an issue of material fact by impeaching the deponent's credibility.

See Thruston, 218 Ariz. 112, ¶ 26 (non-moving party must point to "evidence overlooked or ignored by the moving party"). Indeed, even on appeal, Wright alleges no facts or arguments that would undermine the state's witnesses' credibility. We therefore find no error.

¶38 "In reviewing a grant of summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered." *Timmons v. Ross Dress for Less, Inc.*, 234 Ariz. 569, ¶ 2 (App. 2014). The trial court found, as a matter of law, that Wright could not carry his initial burden of showing ownership due to the imposed sanction, that the state had carried its burden of showing the property was subject to forfeiture, and that Wright could not carry the burden of showing that the property was exempt to the forfeiture due to the imposed sanction. Wright points to nothing in the record showing a disputed issue of material fact as to the property being subject to forfeiture, and we find none.

¶39 Lastly, Wright argues that the trial court erred by failing to grant partial summary judgment for him on the issue of ownership. "We review a denial of a motion for summary judgment for an abuse of discretion and view the facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, ¶ 5 (App. 2006). As the claimant in a forfeiture proceeding, Wright was required to prove ownership "before [any] other evidence is taken." A.R.S. § 13-4310(D). As a result of the sanctions, Wright could produce no admissible evidence to demonstrate that he owned the property. Thus, there was no admissible evidence before the trial court, much less enough evidence to demonstrate there was no genuine dispute about ownership. The court did not err in granting the state's motion for summary judgment and in denying Wright's motion for partial summary judgment.

Disposition

¶40 For the foregoing reasons, we affirm. The state requests attorney fees and costs under Rule 21, Ariz. R. Civ. P. and A.R.S. § 13-4314(F).[6] Under the version of A.R.S. § 13-4314(F) in effect when the state brought the *in rem* forfeiture claim, the state could collect attorney fees against "any claimant who fails to establish that his entire interest is exempt from forfeiture." 2001 Ariz. Sess. Laws, ch. 324, § 3. The state's right to attorney fees had vested under this prior version of the statute. *Cf. Newman*

[6] Under the current statute, effective on August 8, 2017, only a claimant, and not the state, may seek attorney fees. A.R.S. § 14-4314(F).

v. Select Specialty Hospital-Arizona, Inc., 239 Ariz. 558, ¶¶ 18-24 (App. 2016) (the substantive right to collect attorney fees vests on filing of lawsuit).[7] Thus, the state may seek costs and fees on appeal under the prior statute's authority. *See id.* ¶ 44 (granting costs and attorney fees on appeal under authority of prior version of statute). Therefore, we award the state costs and attorney fees upon compliance with Rule 21, Ariz. R. Civ. P.

[7]In *Newman*, as here, the prior version of the statute allowed the court to order attorney fees, while the amended version did not. *See id.* ¶ 18 (contrasting the 2005, 2010, and 2012 versions of A.R.S. § 46-455(H)(4)).